Supreme Court, U.S.
FILED
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No. _____

In the

United States Supreme Court

JIN AH LEE, decedent, by her estate representative, JUNGIL LEE, SANG CHUL LEE, decedent's father, and DUKSON LEE, decedent's mother,

Petitioners,

v.

ANC CAR RENTAL CORP., GENERAL MOTORS CORP., and HONG-JUN JEON,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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Counsel of record for petitioners

QUESTIONS PRESENTED

1. Whether the lower courts in the Ninth Circuit misconstrued the alienage-jurisdiction statute, 28 U.S.C. 1332(a), and thereby erroneously dismissed a case involving aliens on opposing sides, despite the existence of full diversity.

2. Whether the lower courts in the Ninth Circuit misconstrued the international treaty obligations between the United States and Korea, under a Friendship, Commerce and Navigation Treaty, and thereby erroneously dismissed a case involving aliens on opposing sides, despite the existence of full diversity.

LIST OF PARTIES

The parties below were plaintiffs-petitioners Jin Ah Lee, decedent, by her estate representative, Jungil Lee, Sang Chul Lee, decedent's father, and Dukson Lee, decedent's mother; and defendants ANC Car Rental Corp., General Motors Corp., and Hong-jun Jeon.

CORPORATE DISCLOSURE

Not applicable.

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1 James W. Moore, *Moore's Federal Practice* ¶ 0.75[1.-2-3], at 800.41-.42 (2d ed. 1991)

PETITION FOR A WRIT OF CERTIORARI

Honorable C[illegible] Justice Roberts and Associate Justices of the Supreme Court of [illegible]e United States:

Petitioners Jin Ah Lee, decedent, by her estate representative, Jungil Lee, Sang Chul Lee, decedent's father, and Dukson Lee, decedent's mother respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered January 29, 2007, affirming the judgment of the United States District Court for the District of Arizona, entered October 18, 2004.

OPINIONS BELOW

The Court of Appeals' decision and judgment are set forth in *Appendix A*, beginning at App-1. The district court's decision and judgment are set forth in *Appendix B*, beginning at App-10.

STATEMENT OF JURISDICTION

Judgment of the Court of Appeals was filed January 29, 2007. The Court has jurisdiction under 28 U.S.C. § 1254(1) and Rule 13.1 of the Supreme Court Rules.

RELEVANT CONSTITUTIONAL PROVISION

U.S. Const., Art. 3, section 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting. . . *Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens of Subjects.* [Emphasis added.]

RELEVANT TREATY PROVISION

Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, U.S.-South Korea, 8 U.S.T. 2217, T.I.A.S. No. 3097, Art. V:

1. Nationals and companies of either Party shall be accorded national treatment and most-favored nation treatment with respect to access to the courts of justice . . . within the territories of the other Party, *in all degrees of jurisdiction.* [Emphasis added.]

RELEVANT STATUTE

28 U.S.C. § 1332(a)(2):

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

* * *

(2) citizens of a State and citizens or subjects of a foreign state; and

STATEMENT OF THE CASE

1. This petition involves a personal injury action stemming from a single-car rollover crash that killed plaintiff Jin Ah Lee, who was 21 years old at the time of the accident. The situs of the accident was within the District of Arizona at Phoenix.

2. Petitioners, as plaintiffs, commenced a diversity/alienage action in that district, and the case was assigned to Judge James Theilborg. As the district court docket sheet reveals, A1-A8, extensive pretrial proceedings were held before the district court erroneously concluded that there was no subject matter jurisdiction in the federal courts of the United States, when there are aliens on both sides of the litigation.

3. Plaintiffs filed the complaint in August 2003. A9. Answer by ANC Car Rental Corp. was filed in September 2003. A25. Answer by General Motors was filed in October 2003. A36. Answer by Hong Jun Jeon was filed belatedly in January 2004. A46.

4. After substantial discovery and pretrial proceedings, on June 2, 2004, the district court issued an Order to show cause for possible dismissal. A58. Plaintiffs submitted a Memorandum in Opposition to Dismissal on June 10, 2004. A59. Defendant General Motors' supported dismissal in papers dated June 24, 2004, A67; and defendant ANC Rental Corp's joined in that argument by notice dated July 2, 2004, A74. The district court dismissed the action by order dated October 18, 2004, A76, and judgment was entered the same date. A80.

5. Petitioners' notice of appeal was filed on November 9,

2004, A81. The Court of Appeals for the Ninth Circuit affirmed in an unpublished opinion entered January 29, 2007.

6. The lower courts held that the existence of aliens of both sides of this dispute rendered the case without subject-matter jurisdiction under the alienage provision of the diversity statute, 28 U.S.C. 1332(a).

7. Plaintiff Jin Ah Lee, deceased, a Korean national, sues through her estate representative Jungil Lee, who is a citizen and domiciliary of the United States. Compl. ¶ 1.

8. Plaintiffs Sang Chul Lee, decedent's father, and Dukson Lee, decedent's mother, are citizens and domiciliaries of the Republic of Korea. Id. ¶ 2.

9. Defendant ANC Rental Corporation (ANC), the company that rented the car which is the subject of the underlying car accident, has its principal offices located at 200 South Andrews Avenue, Fort Lauderdale, FL 33301. Id. ¶ 3.

10. Defendant General Motors Corporation ("GM") is an entity organized under laws of the State of Michigan with its principal headquarters at New York. Id. ¶ 4.

11. Defendant Hong-Jun Jeon ("Jeon"), the driver of the car, is an alien, a national of the Republic of Korea, having his local address at 400 Mass Avenue #34, Boston, MA 02115, and his permanent address at Kangwondo kangnuen-shi kyoi-dong, Darim Apartments 1803, Republic of Korea. Id. ¶ 5.

REASONS FOR GRANTING A WRIT

I

BECAUSE THE DISTRICT COURT HAD PROPER SUBJECT MATTER JURISDICTION UNDER THE ALIENAGE/DIVERSITY STATUTE, THE LOWER COURTS' ERRONEOUS JUDGMENT SHOULD BE REVERSED

Lower federal courts are courts of limited jurisdiction, and are empowered to hear only cases authorized by statute or the United States Constitution. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).

Article 3, section 2 of the United States Constitution confers federal judicial authority over all matters "between a State, or the Citizens thereof, and foreign States, Citizens of Subjects."

The alienage jurisdiction statute, 28 U.S.C. § 1332(a)(2) implements that constitutional provision, conferring original jurisdiction to federal courts "where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between— (2) citizens of a State and citizens or subjects of a foreign state; . . ."

For a suit initially filed in federal court, as was the case here, the existence or non-existence jurisdiction is determined by reference to the facts as of the time the complaint was filed. *Freeport-McMoran , Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991).

The leading case law from the Ninth Circuit governing alienage-jurisdiction appear to be *Transure v. Marsh and McLennan,* 766 F.2d 1297 (9th Cir. 1985); *Faysound Ltd. v. United Coconut Chems.*, 878 F.2d 290 (9th Cir. 1989); *Mutuelles Unies v. Kroll & Linstrom,* 957 F.2d 707 (9th Cir. 1992). *Transure* discusses that the existence of aliens on both sides does not defeat subject-matter jurisdiction so long as the aliens are among other parties to the action having subject-matter jurisdiction. *Faysound Ltd. v. United Coconut Chems* provides a similar holding. *Mutuelles* discusses how dual citizenship should be treated under the alienage jurisdiction statute.

The Court's most recent construction of the alienage-jurisdiction statute is *JP Morgan Chase Bank v. Traffic Stream (BVI) Infrastructure, Ltd.*, 536 U.S. 88 (2002). The Court held that, to invoke alienage jurisdiction, an alien must be a citizen or subject of some foreign country. *Id.* at 98-99. Alienage jurisdiction exists in all suits between a United States citizen and a foreign state or one of its citizens. In multi-party cases, there is a further requirement of complete diversity as between all of the plaintiffs and all of the defendants. *Mutuelles Unies,* 957 F.2d at 711. That requirement has clearly been satisfied.

The Treaty of Friendship, Commerce and Navigation between the United States and Korea, is relevant. There, Article V shows that:

> 1. Nationals and companies of either Party shall be accorded national treatment and most-favored nation treatment with respect to access to the courts of justice . . . within the territories of the other Party, <u>in all degrees of jurisdiction.</u> [Emphasis added.]

Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, U.S.-South Korea, 8 U.S.T. 2217, T.I.A.S. No. 3097, Art. V.

As *JP Morgan Chase* discusses extensively, the federal courts retained alienage jurisdiction so as to implement such treaty obligations in the sphere of international relations. "The penchant of the state courts to disrupt international relations and discourage foreign investment led directly to the alienage jurisdiction provided by Article III of the Constitution." Id. at 100.

Although this case has multiple plaintiffs and multiple defendants, the analysis is essentially the same. Indeed, *Transure* discusses that the existence of aliens on both sides does not defeat subject-matter jurisdiction so long as the aliens are among other parties to the action having subject-matter jurisdiction. *Transure* cites to 13B Wright, Miller & Cooper *Federal Practice & Procedure* 2d § 3604 (1991 & 2003 Supp), which discusses alienage jurisdiction. The treatise reiterates the weight of the case law: "As is true generally, . . . the court may take jurisdiction over a claim between two aliens that is ancillary to another claim over which it has proper subject-matter jurisdiction. The federal court, not surprisingly, have taken a wide variety of cases under their alienage jurisdiction."

Had plaintiffs sued defendant ANC or defendant GM by itself, there is no question that such a suit would be well within the alienage jurisdiction. There is no reason to hold otherwise merely because defendant Jeon, who was the driver of the subject car, and who was allegedly negligent, and who was a foreign national, happens to be joined as a defendant.

Appellants discussed the application of 28 U.S.C. § *1332(a)(2)* to the facts of this case, but appellees, below, principally led by General Motors, relied upon cases construing the parameters of 1332(a)(3). Here, subsection (a)(2) applies, as it states, "citizens of a State and citizens or subjects of a foreign state; . . . ." The suit between appellants-plaintiffs and General Motors (GM) and ANC Car Rental Corporation is precisely that — between citizens of a State and citizens of [Korea]."

The lower courts apparently held that defendant Jeon is somehow "indispensable" to plaintiffs' product liability claims against GM and ANC but that is a long stretch of the imagination. The only question relating to Mr. Jeon is whether he operated the car in a negligent manner. The entity-defendants are joined for their sale or rental of a defective car — totally different theories of liability.

The *Treaty of Friendship, Commerce and Navigation*, Nov. 28, 1956, U.S.-South Korea, 8 U.S.T. 2217, T.I.A.S. No. 3097, Art. V, plainly provides that a Korean litigant is entitled to the full benefit of the treaty in all jurisdictional manner. There is no indication that 1332(a) was intended to displace the Treaty. Acts of Congress do not abrogate a Treaty merely because they arose later in time; abrogation (or "preemption" can only be found where express congressional intent, to that effect, is found. *E.g. Cook v. United States*, 288 U.S. 102, 120 (1933).

Under the FCN Treaty, plaintiffs-petitioners maintain that the case was properly brought in federal court against all defendants. Under the statute, it was certainly properly brought against the entity-defendants because they were capable of being sued by plaintiffs without defendant Jeon at all, because he is not

"indispensable" to General Motors' independent liability or ANC Car Rental's independent liability.[1]

CONCLUSION

For the foregoing reasons, the Court grant a writ of certiorari and review the decision and judgment of the Court of Appeals which erroneously affirmed the judgment of the district court, and thereupon reverse and remand for further proceedings.

Dated: April 29, 2007

Respectfully submitted,

Michael S. Kimm

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1 Had plaintiffs sued defendant ANC or defendant GM by itself, there is no question that such a suit would be well within the alienage jurisdiction. Despite this fact, according to the district court's decision, if there are aliens on both sides of the lawsuit then 1332(a)(3) must be employed, and the existence of aliens on boths sides runs afoul of the "complete diversity rule." Under these circumstances, *Moore's Federal Practice* suggests that, "In the absence of a Congressional abrogation of the complete diversity rule, such cases might be accommodated through "pendent parties" jurisdiction. 1 James W. Moore, *Moore's Federal Practice* ¶ 0.75[1.-2-3], at 800.41-.42 (2d ed. 1991). *See* 28 U.S.C. 1367.

Appendix A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED JAN 29 2007
CATHY A. CATTERSON CLERK
U.S. COURT OF APPEALS

NO. 04-17288
D.C. NO. CV-03-01532-JAT

JUNGIL LEE, Estate representative for Jin Ah Lee, deceased; SANG CHUL LEE, decedent's father; DUKSON LEE, decedent's mother,

Plaintiffs - Appellants,

v.

ANC CAR RENTAL CORP.; GENERAL MOTORS CORP.; HONG-JUN JEON,

Defendants - Appellees.

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding
Argued and Submitted January 10,2007
San Francisco, California

Before: HUG and W. FLETCHER, Circuit Judges, and HOLLAND**, District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.
** The Honorable H. Russel Holland, Senior United States District Judge for the District of Alaska, sitting by designation.

After Jin Ah Lee, a Korean national, was killed in a car accident in Arizona, her estate representative, Jungil Lee, and Korean national parents, Sang-Chul Lee and Dukson Lee, brought suit in federal court alleging various state law tort claims against three defendants: Hong-Jun Jeon, a Korean national; Alamo/National Rental Car, a Florida corporation; and General Motors, which is incorporated in Delaware and has its primary place of business in Michigan. The district court dismissed the suit for lack of subject matter jurisdiction under the alienage diversity provisions of 28 U.S.C. 5 1332(a). Plaintiffs-Appellants appeal from this final order. We review the district court's subject matter jurisdiction determination de novo, see *Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 938 (9th Cir. 2006), and we affirm.

I. Diversity Jurisdiction Under § 1 332(a)

We have interpreted 5 1332(a)(2) to require complete diversity of parties. That is, aliens may not be on both sides of the litigation. *Faysound Ltd. v. United Coconut Chern., Inc.*, 878 F.2d 290,294 (9th Cir. 1989); Craig v. Atlantic RichJield Co., 19 F.3d 472,476 (9th Cir. 1994) (5 1332(a)(2) does not confer

jurisdiction where a "case involve[s] a single foreign plaintiff... and numerous foreign defendants (in addition to U.S. defendants)"). Because the Plaintiffs-Appellants are Korean nationals,[1] as is Jeon, the complete diversity required for jurisdiction under § 1332(a)(2) is lacking.

Under the plain language of § 1332(a)(3), for jurisdiction to exist there must be both United States citizen plaintiffs and United States citizen defendants. See *Transure, Inc. v. March & McLennan, Inc.*, 766 F.2d 1297, 1298 (9th Cir. 1985). Because here United States citizens, namely Alamo National Rental Car and General Motors, are on only one side of the litigation, 8 1332(a)(3) does not apply.

Contrary to Plaintiffs-Appellants' contention, the lack of diversity under §1332(a) cannot be cured by the district court exercising supplemental jurisdiction over their claims against Jeon under 28 U.S.C. § 1367.

We decline Plaintiffs-Appellants' request that we dismiss Jeon as a party under Federal Rule of Civil Procedure 21, in order to preserve diversity jurisdiction, for two reasons. First, Plaintiffs-Appellants failed to raise this issue before the district court. Second, they have another, timely filed suit pending against all defendants in state court in Arizona. We express no opinion as to whether Jeon is an indispensible party under Federal Rule of Civil Procedure 21.

---

[1] Although Jungil Lee may be a citizen of the United States, for diversity purposes, the legal representative of the estate of a decedent is deemed to have the same citizenship as the decedent. 28 U.S.C. § 1332(c)(2).

II. Diversity Jurisdiction Under § 133 1 (a)

Plaintiffs-Appellants also argue that a 1956 Treaty of Friendship, Commerce and Navigation between the United States and Korea gives rise to federal question jurisdiction under 28 U.S.C. § 133 1 (a). They point to Article V of the treaty, which provides that "[n]ationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice . . . within the territories of the other Party, in all degrees of jurisdiction . . . ." Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, U.S.-Korea, Art. V, 8 U.S.T. 2217.

In *Buechold v. Ortiz*, 401 F.2d 371 (9th Cir. 1968), we interpreted a virtually identical provision in the 1956 Treaty of Friendship, Commerce and Navigation between the United States and Germany. We held that it did not confer original jurisdiction on the federal courts under § 133 1 (a). Id. at 372. As in Buechold, we conclude that the 1956 treaty with Korea does not confer original jurisdiction on the federal courts, but rather provides only that Korean nationals be allowed to bring suit on the same terms as United States citizens. See id. Because United States citizens must satisfy complete diversity to sue in federal court under § 1332(a), requiring Plaintiffs-Appellants to do the same is not inconsistent with the treaty.

For the foregoing reasons, we affirm the order of the district court dismissing Plaintiffs-Appellants' suit for lack of subject matter jurisdiction.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUNGIL LEE, Estate representative for Jin Ah Lee, deceased; SANG CHUL LEE, decedent's father; DUKSON LEE, decedent's mother,

Plaintiffs - Appellants,

v.

ANC CAR RENTAL CORP.; GENERAL MOTORS CORP.; HONG-JUN JEON,

Defendants - Appellees.

NO. 04-17288
D.C. NO. CV-03-01532-JAT

JUDGMENT

Appeal from the United States District Court for the District of Arizona (Phoenix).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED.**

COSTS TAXED.

Filed and entered 01/29/07

Appendix B

OCT 1 8 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-03-1532-PHX-JAT
ORDER

Jin Ah Lee, decedent, by her estate representative, Jungil Lee; Sang Chul Lee, decedent's father; Dukson Lee, decedent's mother,

Plaintiffs,

vs.

ANC Car Rental Corp.; General Motors Corp.; Hong-Jun Jeon,

Defendants.

Pending before this Court is: (1) Plaintiffs' Memorandum of Law (Doc. #27); (2) Defendant General Motors Corporation's ("GMC") Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. #28); and (3) Defendant ANC Car Rental Corporation's ("ANC") Joinder in the Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. #29). The Court has considered the submissions of the parties and rules as follows.

FACTUAL AND PROCEDURAL BACKGROUND

On June 1, 2003, Jin Ah Lee ("decedent") died in an automobile accident outside Flagstaff, Arizona. Decedent's parents and estate representative brought suit against three defendants: GMC, ANC, and Hong-Jun Jeon. Hong-Jun Jeon was the driver of the car when the accident occurred. GMC is the designer and manufacturer of the car. ANC is the rental company that h i s h e d the car to Jin Ah Lee. In their Complaint, Plaintiffs allege that this Court has jurisdiction over their case pursuant to 28 U.S.C. § 1332(a).

According to the Complaint, Plaintiffs Jungil Lee, Sang Chul Lee, and Dukson Lee are Korean nationals. (Doc. #28 at 2). Defendant Hong-Jun Jeon is also a Korean National. *Id,* Defendant GMC is incorporated in Delaware with its principle place of business in Michigan. *Id.* Defendant ANC is incorporated and has its principle place of business in Florida. *Id.*

DISCUSSION

A. Burden of Proof and Standard of Review

"The party asserting jurisdiction has the burden of proving all jurisdictional facts." *Indus. Tectonics, Inc. v. Aero Alloy,* 912 F.2d 1090, 1092 (9th Cir, 1990) (citing *McNutt v.Gen. Motors Acceptance Corp.,* 298 U.S. 178, 189 (1936)). In effect, the Court presumes lack of jurisdiction until the plaintiff proves otherwise. *Stock West, Inc. v. Confederated Tribes,* 873 F.2d 1221, 1225 (9th Cir. 1989). The defense of lack of subject matter jurisdiction may be raised at any time by the parties or the Court. *See* Fed. R. Civ. P.12(h)(3).

B. Substantive Subject Matter Jurisdiction and Alienage

The issue before the Court is whether subject matter jurisdiction exists under 28 U.S.C. 1 332. Specifically at issue is whether diversity jurisdiction exists when foreign nationals are present as both plaintiff and defendant.

Pursuant to 28 U.S.C. § 1332(a)(1) the Court has diversity jurisdiction over cases between citizens of different states involving claims greater than $75,000. Section 1332 requires complete diversity between the parties. *See, e.g., Caterpillar, Znc. v. Lewis,* 5 1 9 U,S, 61,68 (1996). The citizenship of each plaintiff must be diverse from the citizenship of each defendant. *Id.* This principle includes citizens from foreign countries. *Faysound Ltd. v. United Coconut Chems.*, 878 F.2d 290,294 (9th Cir. 1989) (citing C'heng v. Boeing Co., 708 F.2d 1406, 1412 (9th Cir. 1983) ("Diversity jurisdiction does not encompass foreign plaintiffs suing foreign defendants."). [1]

In *Faysound,* a foreign corporation (Faysound, Ltd.)appealed the district court's dismissal of its suit against its insurance company, United States Aviation Underwriters, Inc.,et al. ("Insurers"). *Faysound,* 878 F.2d at 291. In its complaint, Faysound identified its Insurers as "a corporation incorporated and existing under a state of the United States." *Id.* at 292. However, the district court found the Insurers to be a group of eleven insurance companies one of which, Zurich Insurance Company, was a Swiss corporation not incorporated in the United States. Id. at 293. Thus, the parties in Faysound consisted of a foreign plaintiff suing eleven defendants, ten being American and one being foreign. The Ninth Circuit Court of Appeals held that complete diversity did not exist. Id. at 295.

The instant case closely resembles *Faysound.* All three plaintiffs are citizens of Korea. Defendant Hong-Jun Jeon is also a citizen of Korea. As indicated above, there is not complete diversity when a plaintiff and defendant are foreign nationals. *Faysound,* 787 F.2d at 294. Therefore, this Court lacks subject matter jurisdiction. The Court notes that in certain circumstances, a foreign plaintiff can perfect diversity jurisdiction by dismissing a dispensable foreign defendant, thereby allowing the court to exercise jurisdiction over the remaining citizen defendants. See Fed. R. Civ. P. 2 1; Sam v, Beech Aircraft Corp., 625 F.2d 273,277 (9th Cir. 1980). However, in this case, Plaintiffs

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[1] There is a recognized exception to this rule. Complete diversity is not affected when foreign parties are added to an action between citizens of two different states, provided there is a real dispute between the citizen parties. See 28 USC §1332(a)(3); *Transure, Inc.v. Marsh & McLennan, Inc.,* 766 F.2d 1297, 1299 (9th Cir. 1985); Dresser Industries, Inc. v. Underwriters at Lloyd's of London, 106 F.3d 494,498 (3rd Cir. 1997).

[2] Plaintiffs' complaint suggests that decedent's estate representative is a citizen of the United States. (Doc. #1 at 1). However, 28 U.S.C. 5 1332(c)(2) states that "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent . . . ." For purposes of section 1332, decedent's estate representative is also Korean.

have not sought to sever the foreign defendant, nor asked this Court to retain jurisdiction over only the citizen defendants. As the case is now pled, the Court lacks jurisdiction and Plaintiffs have not moved to amend the complaint or dismiss the foreign defendant in such a way as to give this Court jurisdiction over the remaining parties. Therefore, without reaching the issue of indispensable parties, the Court will grant the motion to dismiss the entire case for lack of subject matter jurisdiction.

CONCLUSION

IT IS ORDERED that Defendant General Motor Corporation's Motion to Dismiss (Doc. #28), which Defendant ANC Car Rental Corporation has joined, is GRANTED. This case is therefore dismissed without prejudice for lack of subject matter jurisdiction.

DATED this 14 of October, 2004.

James A. Tielborg
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Stamp: FILED OCT 18 2004
Clerk, U.S. District Court
District of Arizona

JUDGMENT IN A CIVIL CASE
No. CV-03-1532-PHX-JAT

Jin Ah Lee, decedent, by her estate representative, Jungil Lee; Sang Chul Lee, decedent's father; Dukson Lee, decedent's mother,

Plaintiffs,

vs.

ANC Car Rental Corp.; General Motors Corp.; Hong-Jun Jeon,

Defendants.

___ **Jury verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X__ **Decision by Court**. This action came for consideration before the Court. the issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's order dated October 18, 2004, granting motions to dismiss action without prejudice for lack of jurisdiction by General Motors Corp [28-1] and joined by ANC Car Rental Corporation, judgment is entered in favor of defendants and against plaintiffs. Plaintiffs to take nothing, and complaint and action are dismissed.

October 18, 2004

Richard H. Weare
District Court
Executive Clerk

By: [signed], Deputy Clerk

cc: (all counsel/jgmdrw)

Certificate of Service

Michael S. Kimm, Esq., certifies that the foregoing petition was served and filed as follows:

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Dated: April 29, 2007

_____
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(2)

No. 06-1451

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JUN 4 - 2007
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

JIN AH LEE, decedent, by her estate representative, JUNGIL LEE, SANG CHUL LEE, decedent's father, and DUKSON LEE, decedent's mother,

Petitioners,

v.

ANC CAR RENTAL CORP., GENERAL MOTORS CORP., and HONG-JUN JEON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the District Court and Ninth Circuit Court of Appeals properly dismissed this case based upon the lack of diversity of citizenship of the plaintiffs and defendants?

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I. STATEMENT OF THE CASE.

This case arises out of an automobile accident in which plaintiff Jin Ah Lee was killed when she was thrown from a motor vehicle manufactured by defendant General Motors Corporation (GM), owned and rented to customers by defendant ANC Car Rental Corporation (ANC) and driven by defendant Hong-Jun Jeon (Jeon). A10-14, 76-77.[1] This action was brought on behalf of Jin Ah Lee by her parents, Sang Chul Lee and Dukson Lee, and her estate representative, Jungil Lee. A9-10, 76-77. All plaintiffs are Korean nationals.[2] *Id.* Defendant Jeon is also a Korean national, while GM and ANC are Delaware and Florida corporations respectively. *Id.*

On October 18, 2004, the United States District Court for the District of Arizona entered an Order dismissing this case for lack of subject matter jurisdiction. A76-79. In its Order, the District Court found that all plaintiffs, including Jungil Lee, and defendant Jeon are Korean nationals. A77. It then determined that complete diversity jurisdiction does not exist due to the Korean citizenship of

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[1] References to the Appendix submitted to the Court of Appeals and part of the record below are referred to as "A" followed by the appropriate page numbers.

[2] Although Petitioners assert in their Petition for Writ of Certiorari that Jungil Lee is a citizen of the United States, they cite only paragraph 10 of their Complaint for that proposition. Petition at p. 10. Paragraph 10 of the Complaint, however, does not mention Jungil Lee. A10. Moreover, Jungil Lee's citizenship has no bearing upon the issue of whether diversity jurisdiction exists. Pursuant to 28 U.S.C. § 1332(c)(2) "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent . . . " Thus, in this capacity Jungil Lee is deemed a Korean national regardless of her personal citizenship.

plaintiffs and defendant Jeon. A77-79. On appeal the Ninth Circuit Court of Appeals affirmed the judgment of the District Court. Appendix A, App. 1-5 to Petition for Writ of Certiorari.

II. SUMMARY OF THE ARGUMENT.

Because plaintiffs are all Korean nationals and defendant Jeon is a Korean national, complete diversity of citizenship between plaintiffs and defendants does not exist. Accordingly, the District Court and Ninth Circuit Court of Appeals properly determined that this case should be dismissed for lack of jurisdiction. There is no basis upon which the Petition for Writ of Certiorari should be granted.

III. REASONS TO DENY THE WRIT.

A. There Is No Jurisdiction Pursuant To 28 U.S.C. § 1332.

The District Court's factual finding that all plaintiffs and defendant Jeon are Korean nationals is reviewed on appeal under the deferential, clearly erroneous standard. *United States v. McConney*, 728 F.2d 1195, 1200 (9th Cir. 1984); *See* Fed.R.Civ.P. 52(a). The same is true for its finding that GM and ANC are, respectively, citizens of Delaware and Florida. *Id.* The District Court's application of those facts to the law is reviewed *de novo*. *Id.* at 1202.

The question presented by the Petition for Writ of Certiorari is whether diversity jurisdiction is defeated by the fact that all plaintiffs and one defendant

are Korean nationals, while the only United States citizens involved are defendants. Respondent Jeon submits that diversity jurisdiction is defeated on these facts.

Petitioners assert that the District Court has jurisdiction pursuant to 28 U.S.C. § 1332(a)(2), which provides for jurisdiction in actions between "citizens of a State and citizens of a foreign state." In order, however, for diversity jurisdiction to exist pursuant to § 1332(a)(2) there must be complete diversity between all plaintiffs and all defendants. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 373, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978); *Faysound Ltd. v. United Coconut Chemicals, Inc.*, 878 F.2d 290, 295 (9th Cir. 1989). In *Faysound* a Hong Kong corporation sued a group of Philippine and U.S. corporations. Upon determining that the Philippine defendants were indispensable parties, the Ninth Circuit Court concluded that there was no diversity jurisdiction under § 1332(a)(2) as both the plaintiff and one or more indispensable defendants were aliens. *Id.* at 294.

Because both Petitioners and Respondent Jeon are Korean nationals, the complete diversity required for jurisdiction under § 1332(a)(2) does not exist. Only if Jeon is dispensable and dismissed from this action could § 1332(a)(2) diversity jurisdiction exist. As the Ninth Circuit Court pointed out, however, Petitioners failed to request Jeon's dismissal in the District Court and another case against all these same defendants has been brought by Petitioners and is pending in the state court of Arizona. Appendix A, App. 3 to Petition for Writ of Certiorari.[3]

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[3] Interestingly the *Faysound* Court in rejecting plaintiffs' argument in favor of diversity jurisdiction pursuant to § 1332(a)(2) noted that

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Just as diversity jurisdiction is lacking under § 1332(a)(2), it is also lacking under § 1332(a)(3), which provides jurisdiction in cases between "citizens of different States and in which citizens or subjects of a foreign state are additional parties." As the Ninth Circuit Court, citing *Transure, Inc. v. March & McLennan, Inc.*, 766 F.2d 1297, 1298 (9th Cir. 1985), stated in its decision herein, "[u]nder the plain language of § 1332(a)(3), for jurisdiction to exist there must be both United States citizen plaintiffs and United States citizen defendants." Appendix A, App. 3 to Petition for Writ of Certiorari.

In *Transure* a California corporation and a British corporation sued two Delaware corporations and a South African corporation. 766 F.2d at 1298. While the Ninth Circuit Court did determine that the presence of alien corporations on both sides did not defeat diversity jurisdiction pursuant to § 1332(a)(3), it reached this conclusion only because there was a legitimate dispute between two United States corporations from different states, namely the California corporate plaintiff and Delaware corporate defendants. *Id.* at 1298. Specifically the *Transure* Court held that diversity jurisdiction is not defeated where

(1) there is a legitimate controversy between diverse citizens and aliens are additional parties; and

(2) there is complete diversity as to the citizens.

The *Transure* Court cited the example that under § 1332(a)(3) "jurisdiction would exist if a New Yorker and a Canadian sued a Californian and a German, assuming of course, that there

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"garden variety contract actions . . . can find an adequate forum in the courts of the states." 878 F.2d at 294.

was a legitimate dispute between the two Americans." *Id.* at 1298-99.

Only where there are U.S. citizens having complete diversity of citizenship on both sides of an action may diversity jurisdiction exist despite the presence of aliens as additional parties on both sides. That, however, is not the situation here. Here none of the plaintiffs are U.S. citizens. They are all aliens. The only United States citizens are defendants GMC and ANC. Moreover, the fact that the estate representative, Jungil Lee, may possibly be a United States citizen is of no consequence inasmuch as she is deemed to be a Korean citizen, as was the decedent, Jin An Lee, pursuant to 28 U.S.C. § 1332(c)(2).

B. The Treaty Of Friendship, Commerce And Navigation Has No Bearing Upon Whether Diversity Jurisdiction Exists.

Petitioners' assertion that jurisdiction is created by the Treaty of Friendship, Commerce and Navigation (FCN) is without merit. As this Court explained in *Buechold v. Ortiz*, the FCN Treaty merely grants to the Petitioners the same right of access to the Federal Courts as is enjoyed by citizens of the United States. 401 F.2d 371, 372 (9th Cir. 1968); *see* the U.S.–Korea Treaty of Friendship, Commerce and Navigation, 8 U.S.T. 2217, Articles V(1) and XXII(1) (Nov. 28, 1956). Thus, to establish diversity jurisdiction under 28 U.S.C. § 1332, Petitioners must establish complete diversity of citizenship as would a citizen of any state of this country. Petitioners cannot do so because both they and Respondent Jeon are citizens of Korea.

IV. CONCLUSION.

For the foregoing reasons this Court should deny Petitioners' request for a writ of certiorari and thereby affirm the judgment of the District Court and the Ninth Circuit Court of Appeals.

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